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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,

Petitioner,

v.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, HAENN SHIP CEILING AND REFITTING CORPORATION.

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OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed July 17, 1951 (R. 192a)* is reported at 99 F. Supp. 226. Judge McGranery's supplemental opinion, embodying the entry of judgment filed September 28, 1951 (R. 202a) is reported at 100 F. Supp. 338. The opinion of Circuit Judge

* Numbers within parentheses refer to pages in the printed record.

McLaughlin of the United States Court of Appeals for the Third Circuit, filed August 27, 1952 (R. 231) as amended September 4, 1952 (R. 246) and November 3, 1952 (R. 272) is reported at 198 F. 2d 800.

JURISDICTION.

The jurisdiction of this Court to review the final judgments of the United States Court of Appeals for the Third Circuit is provided by § 1254(1) and § 2101(c) of Title 28, U. S. Code.

STATEMENT OF THE CASE.

The petitioner's statement of the case adequately presents the facts.

ARGUMENT.

The respondent, Haenn Ship Ceiling and Refitting Corporation (which will hereafter be referred to as "Haenn"), is not legally concerned with the petitioner's argument relating to the effect of the contributory negligence of Hawn on his right of recovery.

The petitioner does not attack the decision of the Court of Appeals reversing the judgment in favor of the petitioner against the respondent Haenn (R. 273, 274).

The petitioner does not ask any affirmative relief or order by your Honorable Court in its favor against the respondent Haenn.

We submit therefore that the Petition for Certiorari as to the respondent Haenn was improvidently granted and should be dismissed.

The respondent Haenn is indirectly concerned with the second question raised by the petitioner, i. e., "Whether Haenn is entitled, in effect, to indemnify itself at Pope & Talbot's expense" (Petitioner's Brief, p. 47), and this brief will be limited to that question.

The Petitioner Is Not Entitled to Have the Judgment of Hawn Reduced by the Amount of Compensation and Medical Expenses Which Hawn Has Agreed to Pay the Respondent Haenn.

The petitioner is asking this Court to reduce Hawn's judgment against it by the amount of compensation payments and medical expense which Hawn has agreed to repay to Haenn. If Hawn carries out his agreement, Haenn, his employer, will suffer no loss, although he has been negligent in causing the injury. The petitioner contends that by reason of Haenn's negligence it should be deprived of its right of subrogation under the Longshoremen's & Harbor Workers' Act and of the benefit of the contract it made with Hawn to repay the amounts paid him as compensation and to reimburse it for medical expense.

If Hawn's judgment against the petitioner is reduced, the effect of this will be that the petitioner will obtain a partial contribution from its joint tortfeasor contrary to the decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282.

The Court of Appeals on the authority of *Halcyon* held that the petitioner was not entitled to obtain contribution in this manner.

In this case, after Hawn's injury, his employer, respondent Haenn, paid compensation to him under the Harbor Workers' Act and, notwithstanding Hawn's election to sue the petitioner, it has continued to pay compensation upon an agreement that if and when judgment was collected against the petitioner, Hawn would repay all compensation payments and moneys expended for his treatment (R. 202).

Under Section 33 of the Act, Hawn had the right to elect to receive compensation or to recover damages against a third person (33 U. S. C. Sec. 933(a)). That section provides as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

In this case, Hawn received payments of compensation and later elected to sue the petitioner, as he clearly had a right to do, *American Stevedores v. Porello*, 330 U. S. 446, 455-456.

If the employee elects to proceed against a third person the employer's obligation under the Act is limited to a sum equal to the difference between what the employer is obligated to pay under the Act and the amount recovered from the third person, as provided in Section 33(f) of the Act (33 U. S. C. 933(f)), as follows:

> "(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

In view of these provisions, the respondent Haenn, upon the election of Hawn to sue, was legally justified in discontinuing compensation payments, pending the eventual outcome of the suit against the petitioner. In agreeing to continue compensation payments, Haenn undertook an obligation which it was not bound under the law to perform and Hawn received the benefit of weekly payments, which

he could not legally demand. This was a valid and binding agreement and is of no legal concern to the petitioner.

There is no merit in the petitioner's contention that if Hawn recovers his judgment in full he would be obtaining a double recovery by reason of having received compensation from his employer (Petitioner's Brief, p. 47). This is not true because by his agreement Hawn is obligated to repay to Haenn the moneys which he has received. If there had been no such agreement Hawn would have received from his employer a much smaller sum. If Haenn had made no payments of compensation, it certainly could not be contended that Hawn's judgment should be reduced and there would be no basis for the petitioner to so contend. The petitioner's demand that Hawn's judgment be reduced is therefore based solely upon the fortuitous existence of the contract to repay, which the parties were free to make and is supported by ample consideration.

It is argued that if Hawn carries out his agreement to repay Haenn, the entire burden of the damages is shifted to the petitioner and that it is paying not only for its own fault but for that of the respondent Haenn. This contention is not sound for the reason that the judgment of Hawn against the petitioner represents compensatory damages for injuries caused by its own negligence under proper instructions by the Court as to the elements of damage which were to be comprehended by the verdict (R. 156). Actually the damages were computed without consideration of any obligation on the part of the respondent Haenn to make any payments under the Act. Under the instructions of the Court the damages would have been the same even though the respondent Haenn were not a party to the action. The damages also were fixed without any consideration of Hawn's agreement to repay the moneys he had received. The situation is much the same as if Hawn had assigned to any third person a part of his judgment.

There is no shifting of part of the burden of the judgment from the respondent Haenn to the petitioner. The

petitioner is paying only the price of its negligence as determined by the jury. It is clear under the *Halcyon* case that had the respondent Haenn been a joint tortfeasor and a person other than Hawn's employer, the petitioner could not claim contribution from his joint tortfeasor. The mere fact that the joint tortfeasor is the employer of the injured party, and subject to the provisions of the Harbor Workers' Act, should not operate legally to create a right of contribution in favor of the petitioner, which it otherwise does not have.

We submit that the existence of the Harbor Workers' Act and the fact that its provisions are binding upon respondent Haenn do not create any rights or benefits in favor of the petitioner.

The Act confers upon an injured employee a right to compensation regardless of negligence or fault on the part of his employer (33 U. S. C. Sec. 904).

Section 905 provides, in material part, as follows:

> "The liability of an employer described in Section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *." (33 U. S. C. 905.)

It is clear that under Section 33 of the Act, subdivisions (b), (c), (d) and (e), where an employer pays under an award the employee's cause of action against a third party is assigned to the employer, who alone is entitled to prosecute the action and out of any recovery the employer is entitled to retain expenses and attorney's fees in the suit, the cost of benefits furnished to the employee and amounts paid as compensation. The balance is to be held in trust for the payment of all future compensation to become due and any excess is payable to the employee (33 U. S. C. 933 (b), (c), (d), (e)).

Although the Act does not in terms provide for subrogation where compensation payments and expenses are made by the employer in the absence of a formal award, it has been held that the employer is entitled to subrogation out of his employee's recovery against a third party. *The Etna*, 138 F. 2d 37.

In that case the Court said that the purpose of the Act is to secure prompt and periodic payments of compensation without an award as required by Section 14(a) of the Act (33 U. S. C. 914(a)), and it was held that the voluntary payment without an award did not deprive the employer of his right to reimbursement out of the judgment recovered against a third party.

The obligation of the employer to pay is without regard to his negligence and the law has imposed upon him this duty in exchange for an immunity from suits for damages by all of his employees.

In *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra*, this Court said:

> "Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act, Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation." (pp. 285, 286.)

Section 33 of the Act, which has been amended since its original enactment, shows that Congress has given particular attention to the right of subrogation of the employer who has paid under an award (33 U. S. C. 933). It provides for the disposition of the moneys recovered by the employer and defines his position with his employee where the recovery is more or less than the employee would be

entitled to receive as compensation. The subdivisions of this section of the Act, comprehend all of the various contingencies which may arise, thus indicating that the rights of both the employer and the employee were given full consideration by Congress.

The Act does not provide that the employer's right to proceed against a third party is conditioned upon his being free from fault or negligence in causing the injury. In such a proceeding he is enforcing the right of his injured employee. When he seeks reimbursement by way of subrogation pro tanto in a judgment obtained by his employee against a third party he stands in no different position. He is getting back only the payments which the law has compelled him to make without regard to any fault on his part.

To construe the Act so as to deny subrogation to an employer because he was contributorily negligent in bringing about the injury to his employee, would be writing into the Act a provision which Congress, in specific terms, did not include. Congress has legislated extensively in the field of maritime personal injuries, as was pointed out by this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra* (pp. 285, 286), and this Court expressed the view that the question of contribution, whether based on equal division of damages or relatively apportioned in accordance with the degree of fault of the parties, should be left to Congress. So in this case there is no justification for so interpreting the Act to deny subrogation to the employer, especially when the actual effect thereof is to enable a negligent third party to obtain from an employer who has paid compensation without regard to his negligence a partial contribution or reduction in the damages which the third party has been obliged to pay by reason of his own negligence.

The petitioner's contention that the respondent Haenn should be deprived of its right of subrogation because of its

negligence is the precise question which was considered by the Court of Appeals for the Third Circuit when it decided the *Halcyon case* (*sub nom. Baccile v. Halcyon Lines*, 187 F. 2d 403). The Court of Appeals held that the employer subject to the terms of the Act was required to make "contribution to the extent of the compensation he would have had to pay to the employee, had the employee not elected to sue the third party" (p. 406). That decision of the Court of Appeals was reversed by this Court in the *Halcyon Case, supra*. The petitioner's contention, therefore, has been already rejected by this Court.

CONCLUSION.

It is respectfully submitted that the petitioner is not entitled to have the judgment against it reduced because of the negligence of the respondent Haenn, and that the concurring negligence of Haenn does not affect its right to be subrogated in part to Hawn's judgment or to have the benefit of its contract with Hawn. The petition as to this respondent should therefore be dismissed.

Respectfully submitted,

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